

DEC 21 1978

MICHAEL GOODMAN, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

No.

NEWPORT NEWS SHIPBUILDING AND
DRY DOCK COMPANY,

Petitioner,

vs.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION
PROGRAMS, U. S. DEPARTMENT OF LABOR

AND

SAMMY J. JENKINS,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT.**

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OPINIONS BELOW.

These matters arise under the Longshoremen's and Harbor Workers' Compensation Act, as amended in 1972. The Decisions and Order of the Administrative Law Judge is unreported and is printed as Appendix "C" to this Petition. The Decision of the Benefits Review Board of the Department of Labor affirming the Decision and Order of the Administrative Law Judge appears as Appendix "B" hereto. The judgment and opinion of the Fourth Circuit Court of Appeals, decided September 21, 1978, affirm-

ing the Decision of the Benefits Review Board, is officially reported at 583 F. 2d 1273 (4th Cir. 1978) and is printed as Appendix "A" hereto.

JURISDICTION.

The judgment of the Fourth Circuit Court of Appeals was entered on September 21, 1978. A rehearing was not sought and the Petition for Writ of Certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether the denial of a claimant's workers compensation claim by a state Industrial Commission which became final is a bar to the claimant's subsequent claim under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) under the "Full Faith and Credit" clause of the United States Constitution or the principle of "*res judicata*?"

2. Whether a claimant who has been advised that he has a work-aggravated disease and is informed that he may have a claim under the LHWCA can wait more than the one-year period permitted by 33 U. S. C. § 913(a) to file his claim?

3. Whether an administrative Law Judge may apply the statutory presumption of compensability of 33 U. S. C. § 920(a) in a case in which substantial evidence exists that the claim is not compensable?

STATUTES INVOLVED.

The state and federal statutes involved in this matter are as follows:

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general

Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

United States Constitution,
Article IV, Section 1

Section 65.1-40 Employee's rights under Act exclude all others. The rights and remedies herein granted to an employee when he and his employer have accepted the provisions of this Act respectively to pay and accept compensation on account of personal injury or death by accident shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents, or next of kin, at common law or otherwise, on account of such injury, loss of service or death.

Virginia Workmen's Compensation Act
Section 65.1-40 (1950)

65.1-98 Conclusiveness of award; appeal—the award of the Commission, as provided in 65.1-96, if not reviewed in due time, or an award of the Commission upon such review, as provided in 65.1-97, shall be conclusive and binding on all questions of fact. * * * * appeal shall lie from such award to the Supreme Court in the manner provided in the rules of the Supreme Court; . . .

Virginia Workmen's Compensation Act
Section 65.1-98 (1950)

Section 13(a) Except as otherwise provided in this Section, the right to compensation for disability or death under this Act shall be barred unless a claim therefor is filed within one year after the injury or death. If payment of compensation has been made without an award on account of injury or death, a claim may be filed within one year after the date of last payment. Such claim shall be filed with the Deputy Commissioner in the compensation district in which such injury or death occurred. The time for filing a claim shall not begin to run until the employee or beneficiary is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the employment.

Longshoremen's and Harbor Workers'
Compensation Act, 33 U. S. C. § 13(a)

In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—

- (a) That the claim comes within the provisions of this chapter. . . .

* * * *

Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 920(a)

STATEMENT OF THE CASE.

Sammy Joe Jenkins (hereinafter the Claimant), was employed as a welder with the Newport News Shipbuilding and Dry Dock Company (hereinafter Newport News Shipbuilding). During the latter part of 1973, he began to experience periodic episodes of coughing. On January 7, 1974, he lost the ventilation equipment in the space in which he was working and was subject to a severe coughing spell as a result of welding smoke. On that day, he went to the employer's clinic where a nurse told him to return to work and to avoid smoke.

On January 14, 1974, he again inhaled some welding smoke and began to cough. He returned to the same clinic where he saw Dr. Gillespie, one of the employer's physicians, who told the claimant what he already undoubtedly knew, that he had "bronchitis aggravated by welding smoke." In conjunction with the examination, the claimant was furnished with three (3) copies of Form LS-201, the form used to apply for benefits under the LHWCA.

The claimant returned to see Dr. Gillespie once more in January and in March, June and August of 1974. Dr. Gillespie recommended all along that the Claimant either weld only in open areas or cease welding altogether.

On January 24, 1974, Dr. Gillespie prepared a "Report of Medical Qualification Status," in which he stated that the claimant's bronchitis was aggravated by welding smoke and that

he should only work in smokeless areas or transfer. The estimated duration of that medical qualification was indefinite.

In early 1975, the claimant filed a claim for compensation with the Virginia Industrial Commission on the basis that he incurred a lung disease as a result of his exposure to welding gasses at Newport News Shipbuilding. An evidentiary hearing was held before a Commissioner of the Industrial Commission on March 21, 1975 and in a written opinion dated April 1, 1975, the Commissioner denied benefits to the Claimant. That decision was appealed to the full Industrial Commission, which rendered a written opinion on June 11, 1975, affirming the prior opinion of the Commissioner. The decision was not appealed to the Virginia Supreme Court, pursuant to § 65.1-98 Code of Virginia, as amended.

On June 4, 1975, the claimant filed a claim under the LHWCA, alleging chronic bronchitis and emphysema as the result of his employment. On December 12, 1975, a hearing was held before an Administrative Law Judge (ALJ), who rendered a decision on July 19, 1976, awarding the claimant 60% temporary partial disability compensation for work-caused or aggravated lung disease. The judge based the Award on the presumption of compensability contained in § 20 of the LHWCA, 33 U. S. C. § 920(a). On May 13, 1977, that decision was affirmed by the Benefits Review Board (BRB) of the Department of Labor.

REASONS FOR GRANTING THE WRIT.

There Is A Clear and Irreconcilable Conflict Within the Fourth Circuit Court of Appeals as to the Meaning of Two Supreme Court Decisions Concerning a Claimant's Right to Elect Either a State or Federal Remedy for an Occupational Injury.

The decision of the Fourth Circuit Court of Appeals in the present action is in clear and irreconcilable conflict with its decision in *Pettus v. American Airlines, Inc.*, F. 2d

(Docket No. 77-2230) (4th Cir., September 26, 1978) concerning the interpretation and applicability of the decisions of this Court¹ on the issue of a claimant's right to elect either a state (Virginia) or federal (LHWCA) remedy for an occupational injury.

In *Jenkins, supra*, and in *Pettus, supra*, the Fourth Circuit Court of Appeals was faced with substantially identical factual situations, each involving a claimant who first elected to proceed under the Virginia Compensation Act to seek benefits for claimed occupational injuries. In *Jenkins*, the claimant sought benefits for a lung condition, claimed to have arisen from or to have been aggravated by his employment. After an evidentiary hearing before a Commissioner of the Virginia Industrial Commission, the claim was denied and this decision was subsequently affirmed on appeal by the full Industrial Commission.² The decision was not appealed and became final.³

In *Pettus, supra*, the claimant received a compensation award from the Virginia Industrial Commission which was subsequently terminated by the Industrial Commission because of claimant's refusal to undergo back surgery. This decision likewise was not appealed and became final.

Thereafter, both claimants filed new claims under the LHWCA.⁴ Subsequently, *Jenkins* was awarded benefits by the ALJ which decision was affirmed by the BRB. The ALJ denied benefits to *Pettus*, which decision was reversed by the BRB.

1. *Magnolia Petroleum v. Hunt*, 320 U. S. 430 (1944); *Industrial Commission of Wisconsin v. McCartin*, 330 U. S. 622 (1947).

2. The Virginia Compensation Act, Section 65.1-98 (1950) provides that a decision of the Industrial Commission can be appealed to the Supreme Court of Virginia.

3. A final decision of the Virginia Industrial Commission, if not challenged by appeal to the Virginia Supreme Court, is conclusive. *Dillard v. Industrial Commission*, 416 U. S. 283 (1974).

4. Pettus filed his claim under the District of Columbia Workmen's Compensation Act which is the LHWCA as extended by Congress to the District of Columbia.

Thereafter, both awards under the LHWCA were appealed to the Fourth Circuit Court of Appeals. On appeal, the Fourth Circuit was faced with the issue of determining whether the claimants were barred under the doctrines of "*res judicata*" and the "Full Faith and Credit" clause⁵ of the United States Constitution from receiving benefits under the LHWCA because the Virginia Compensation Act⁶ contains an *exclusive* remedy provision and by thus initially proceeding under the state act the claimants had made a binding election of remedies.

The Fourth Circuit Court of Appeals rendered conflicting and irreconcilable decisions. In *Jenkins*, the claimant was entitled to benefits because the doctrine of election of remedies was inapplicable to the state-federal dichotomy and thus his claim was *not* barred by "*res judicata*" or the "Full Faith and Credit" clause. In *Pettus*, the Court found that the doctrine of election of remedies was indeed applicable to the state-federal issue and thus the claimant was *barred* from receiving benefits under the doctrine of "*res judicata*" and the "Full Faith and Credit" clause.

In reaching these conflicting decisions, the Fourth Circuit Court of Appeals relied on each case upon the decisions of this Court in *Magnolia Petroleum v. Hunt*, 320 U. S. 430 (1944) and in *Industrial Commission of Wisconsin v. McCartin*, 330

5. U. S. Constitution, Article IV, Section 1; states as follows:

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

6. Section 65.1-40 Employee's rights under Act *exclude* all others. The rights and remedies herein granted to an employee when he and his employer have accepted the provisions of this Act respectively to pay and accept compensation on account of personal injury or death by accident shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents, or next of kin, at common law or otherwise, on account of such injury, loss of service or death.

Virginia Workmen's Compensation Act
Section 65.1-40 (1950)
(Emphasis added).

U. S. 622 (1947) as authority for the contrary positions that the election of remedies and therefore "res judicata" and the "Full Faith and Credit" clause did not apply in *Jenkins* but did apply in *Pettus*.

The Petitioner contends that the decisions of this Court in *Magnolia Petroleum* and in *McCartin* do not and cannot support such diametrically opposed results. Further, the convoluted reasoning of the Fourth Circuit Court of Appeals apparent in the conflicting interpretations of those decisions is a clear manifestation of the serious and continuing confusion facing the courts in the proper interpretation of the jurisdictional interface between state and federal remedies for occupational injuries. It is submitted that such confusion can only be resolved by a final, definitive decision by this Court.

The Decision of the Administrative Law Judge, Benefits Review Board and Fourth Circuit Court of Appeals Is in Clear and Direct Conflict with the Provision of the LHWCA Regarding the Statute of Limitations and Decisions of the United States Supreme Court Interpreting That Provision.

The holding of the ALJ, as affirmed by the BRB and the Fourth Circuit, that the statute of limitations had not expired in this case, is in direct conflict with the limitation provision of the LHWCA, 33 U. S. C. § 913(a),⁷ and the Supreme Court's interpretation of that provision in the case of *Pillsbury v. United Engineering Co.*, 342 U. S. 197 (1952).

7. "Except as otherwise provided in this section, the right to compensation for disability or death under this chapter shall be barred unless a claim therefor is filed within one year after the injury or death.

"The time for filing a claim shall not begin to run until the employee or beneficiary is aware, or by the exercise of reasonable diligence, should have been aware, of the relationship between the injury or death and the employment.

Injury is defined by the LHWCA to include disease. 33 U. S. C. § 902(2).

In the present case, the Court found that the claimant could not reasonably have been aware of the relation of his lung condition to his employment until October, 1974, less than one year before he filed the federal claim.

The ALJ found as a fact that the claimant in this case was advised on January 14, 1974, that he had a lung condition aggravated by his work. Despite this finding, the judge, BRB, and Fourth Circuit upheld his claim as timely, even though it was filed some *seventeen months later*.

The ALJ in this case held that the rule set out in *Aerojet-General Shipyards, Inc. v. O'Keefe*, 413 F. 2d 793 (5th Cir. 1969), controlled his disposition of this case. The ALJ stated that this rule required that the effects of exposure to factors which caused [or aggravated] an occupational disease must manifest themselves to a physician rather than to an unschooled employee before limitations begin to run. *Aerojet-General* does not stand for such a broad proposition, as the Third Circuit noted in its decision in *Sun Shipbuilding and Dry Dock Company v. Bowman*, 501 F. 2d 146 (3rd Cir. 1975).

In addition, in *Aerojet-General*, the company contended that pulmonary fibrosis and rheumatoid arthritis were somehow related to an injured ankle. The court stated specifically in *Aerojet-General* that it was *not* considering the question of how it would rule on the statute of limitations issue if the claimant knew of his lung disease at the same time he knew of his ankle injury.

The ALJ in this case also held that the rule set out in *Stancil v. Massey*, 436 F. 2d 294 (D. C. Cir. 1970), controlled. In *Stancil*, a worker sustained what was originally thought to be a back strain. It later turned out he had a ruptured disc. The court held that the statute of limitations did not begin to run until the true severity of his injury was known.

In the instant case, the claimant's condition never became more severe. As a matter of fact, after he stopped welding, it probably improved. The rule of *Stancil v. Massey* is clearly not

applicable to the present action. The claimant here knew that he had a lung condition aggravated by his employment and waited more than one year to file his claim.

Even if the rule of *Stancil v. Massey* were applicable, that decision is inconsistent with the Supreme Court's ruling in the case of *Pillsbury v. United Engineering Co., supra*, which held that a claim filed more than one year from the date on which a person knows of the connection between work and an injury is untimely.

Although claimant knew as early as January, 1974, that he had respiratory problems which were aggravated by his exposure to welding smoke, he failed to file his claim until June 4, 1975.

Petitioner contends that the serious controversy regarding the proper rule to be applied in determining when the statute of limitations begins to run can only be resolved by a definitive determination by this Court.

The Administrative Law Judge, Benefits Review Board and Fourth Circuit Court of Appeals Each Misinterpreted and Misapplied the Decision of This Court in *Delvecchio v. Bowers* Interpreting the Presumption of Compensability Under the LHWCA.

In this case, the ALJ held that the Employer had not produced enough evidence of sufficient weight to overcome the presumption of compensability provided by Section 20(a) of the LHWCA, 33 U.S.C. § 920(a). The judge acknowledged that Dr. Stallard, an expert witness presented by the employer, had stated that the claimant's permanent lung damage was "not precisely related to his welding exposure." The judge further noted that Dr. Stallard had opined that while welding may have temporarily aggravated an underlying lung condition, it was not sufficient to have produced a permanent effect. Though the judge ultimately awarded only temporary disability, he rejected Dr. Stallard's testimony as "incredible."

The very fact that the judge concluded the claimant's condition was only temporary is conclusive evidence by itself that Dr. Stallard's testimony obviously was not "incredible."

Dr. Laurie Moore, who also examined the claimant, testified that, at most, the claimant's lung condition was "possibly aggravated by welding," and the disease was probably caused by cigarette smoking.

In *Del Vecchio v. Bowers*, 282 U.S. 280 (1935) this Court correctly stated that any substantial evidence offered to rebut the presumption of compensability serves to render the presumption *inoperative*. This means the presumption may no longer be relied upon, in the face of substantial evidence contrary to the presumption. However, despite clear medical evidence directly contradicting the presumption, the ALJ relied on the presumption. This error was subsequently endorsed by the BRB and the Fourth Circuit and is in direct conflict with the decision in *Del Vecchio v. Bowers, supra*.

The fallacy of the reasoning of the Administrative Law Judge can readily be seen in the case of *Cordero v. Triple A Machine Shops*, 580 F.2d 1331 (9th Cir. 1978) in which the Ninth Circuit Court of Appeals, when faced with identical facts to those of the instant case, upheld a decision of the ALJ in favor of a claimant when that ALJ found that the presumption *had been rebutted*.

The inconsistency of the actions of the lower Courts in interpreting the applicability and scope of the presumption is clearly evident when one ALJ is allowed to apply the presumption while another ALJ is precluded from such action. Petitioner contends that such confusion will continue until this Court addresses the issue of the presumption of compensability and sets out the proper guidelines to be followed.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted and that the decree of the Fourth Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX A.

UNITED STATES COURT OF APPEALS
For the Fourth Circuit

 No. 77-1886

Newport News Shipbuilding and Dry Dock Company,
Petitioner,
 vs.

Director, Office of Workers' Compensation Programs, United
 States Department of Labor,

and

Sammy J. Jenkins,

Respondents.

Upon Petition to set aside order of the Benefits Review Board,
 United States Department of Labor

 Argued May 1, 1978

 Decided September 21, 1978

Before Haynsworth, Chief Judge, Field, Senior Circuit Judge,
 and Widener, Circuit Judge.

Mark A. Lies (Robert H. Joyce, Seyfarth, Shaw, Fairweather
 and Geraldson; William McL. Ferguson, Shannon T. Mason,
 Jr., Ferguson and Mason on brief) for Petitioner; Joshua T.
 Gillelan, II, Attorney, U. S. Department of Labor, for Re-
 spondents; Robert Arthur Blount for Respondents.

Field, Senior Circuit Judge:

On April 1, 1975, a commissioner of the Industrial Commission of Virginia "denied and dismissed" the application of Sammy J. Jenkins for state workmen's compensation, concluding that the medical evidence failed to establish a causal relationship between the claimant's work-related exposure to welding fumes and the respiratory disability of which he complained. Upon review, the full Commission concurred, and on June 11, 1975, affirmed the commissioner's disposition of the claim. During the June 4th hearing upon the appeal from the single commissioner's award, a commissioner apparently suggested to the claimant that he was in the wrong forum because this was a "federal case."¹ On the same day Jenkins filed a claim for compensation based upon his respiratory disability under the federal Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 901, *et seq.*

Upon an evidentiary hearing, a federal administrative law judge determined that Jenkins, who worked as a welder aboard ships under construction, was engaged in "maritime employment" covered by the federal Act. Finding no evidence that Jenkins' serious respiratory problems existed prior to his tenure with the company, and concluding that the evidence offered by the employer on the issue of causation was insufficient to rebut the statutory presumption of compensability, the judge held that the claimant's disease was either caused or aggravated by his employment. The resulting award of compensation to Jenkins for a temporary disability was affirmed by the Labor Department's Benefits Review Board on May 13, 1977.²

The claimant's employer, Newport News Shipbuilding and Dry Dock Company, has petitioned for review, asking that we set aside the Board's affirmation of the Longshoremen's Act

1. This, however, was only an informal suggestion, and it was not the reason cited by the Commission for affirming the denial of the claim.

2. The Board's decision is reported at 6 BRBS 133 (1977).

award and dismiss the employee's claim.³ Petitioner maintains, as it did throughout the federal administrative proceedings, that the award was improper because (1) the claimant's initial pursuit of state compensation barred a federal award under the principles of "election remedies," *res judicata*, and "full faith and credit;" (2) the application for Longshoremen's compensation was not timely filed; and (3) the award is not supported by substantial evidence.

Persuaded by none of these arguments, we affirm the final order of the Benefits Review Board.

I

We do not agree that Jenkins' prosecution of his claim under the Virginia compensation act constituted a "binding election of remedies" which deprived him of the right to subsequently pursue an award under the Longshoremen's Act. So far as we can ascertain, whatever legitimacy an "election of remedies" defense may once have enjoyed under the Act was attributable to a now defunct provision of the federal statute which brought an injury within the statute's coverage only if "recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law." Longshoremen's and Harbor Workers' Compensation Act. c. 509, § 3, 44 Stat. 1426 (1927) (current version at 33 U. S. C. § 903). See *Hahn v. Ross Island Sand & Gravel Co.*, 358 U. S. 272 (1959); *Davis v. Department of Labor*, 317 U. S. 249 (1942). Cf. *Shea v. Texas Employers' Insurance Association*, 383 F. 2d 16, 18-20 (5 Cir. 1967).⁴ This language was deleted from the Act in 1972, Pub.

3. We have jurisdiction under 33 U. S. C. § 921, as amended, 1972.

4. Many of the reported cases decided under the old statute recognized the "election of remedies" defense, but were less than explicit in their reasons for doing so. More often than not, the defense was found not to preclude federal relief, although any sums paid to the employee under a prior state award or by virtue of an employer's voluntary compliance with a state statute were, of course, credited

(Footnote continued on next page.)

L. No. 92-576, § 2(c), 86 Stat. 1251, and at present the federal statute contains no language indicating even an arguable intention by Congress to prohibit an award of Longshoremen's benefits after resort has been had to a state's compensation program.⁵ Nor is there any constitutional objection to the pursuit of both state and federal remedies. Since at least 1962, it has been clear that both the federal and the state governments are constitutionally competent to redress, via workmen's compensation-type remedies, injuries occurring upon the navigable waters in the course of ship construction. *Calbeck v. Travelers Insurance Co.*, 370 U. S. 114 (1962).

To the extent that the petitioner may be understood to alternatively suggest that this is an appropriate case for the application of the traditional "election of remedies" doctrine which has an independent foundation in the common law, we note that in the absence of express legislative declaration to the contrary, the courts have been reluctant to extend this relatively harsh doctrine. See *Brooks v. United States*, 337 U. S. 49, 53 (1949); *Friederichsen v. Renard*, 247 U. S. 207 (1918). In any event, it is inapplicable where, as here, the second remedy which is pursued following an alleged "election" is not theoretically irreconcilable with the first, and does not require a claimant to assume a position inconsistent with that which he took in his initial quest for relief. *United States v. Oregon*

(Footnote continued from preceding page.)

upon the federal award. See, e.g., *Calbeck v. Travelers Insurance Co.*, 370 U. S. 114, 131 (1962); *Peter v. Arrien*, 463 F. 2d 252 (3 Cir. 1972); *Harney v. William M. Moore Building Corp.*, 359 F. 2d 649 (2 Cir. 1966) (dictum); *Western Boat Building Co. v. O'Leary*, 198 F. 2d 409 (9 Cir. 1952); *Newport News Shipbuilding and Dry Dock Co. v. O'Hearne*, 192 F. 2d 968 (4 Cir. 1951); *Massachusetts Bonding & Insurance Co. v. Lawson*, 149 F. 2d 853 (5 Cir. 1945).

5. To the contrary, in the course of amending the Act in 1972, the Congress expressed deep concern that state compensation schemes were inadequate to the task of properly compensating maritime workers for their injuries, and sought to address this deficiency by improving the remedy available under federal law. H. R. REP. NO. 1441, 92nd Cong., 2nd Sess. (1972), reprinted in 1972 U. S. CODE CONG. & AD. NEWS 4698.

Lumber Co., 260 U. S. 290, 304 (1922) (Brandeis, J., dissenting); *Abdallah v. Abdallah*, 359 F. 2d 170 (3 Cir. 1966); 1B Moore's Federal Practice ¶ 0.405[7] (Second Edition).

Finally, in allowing Jenkins to pursue his federal Longshoremen's remedy, we discern no conflict with the "exclusivity" provision of the Virginia compensation statute, Va. Code § 65.1-40, which provides that:

"[t]he rights and remedies herein granted to an employee when he and his employer have accepted this Act respectively to pay and accept compensation on account of personal injury or death by accident shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin, at common law or otherwise, on account of such injury, loss of service or death."

Virginia itself has long recognized that where the Industrial Commission dismisses a claim upon a finding that the injury did not arise out of or in the course of employment, as it did in this case, § 65.1-40 is not to be interpreted to bar the employee from pursuing other available remedies. See *Griffith v. Raven Red Ash Coal Co.*, 179 Va. 790, 20 S. E. 2d 530 (1942). See also, *Perrin v. Brunswick Corp.*, 333 F. Supp. 221 (W. D. Va. 1971).

We thus agree with the Benefits Review Board that Jenkins was not, solely by reason of his "election" to initially seek compensation in proceedings before the State Industrial Commission, barred from later filing a claim or receiving an award for the same alleged injury under the Longshoremen's Act.

II

Petitioner's reliance upon the doctrine of *res judicata* is similarly misplaced. Committed to the exclusive jurisdiction of a federal forum, Jenkins' claim for Longshoremen's benefits neither was nor could have been litigated in the state proceedings. It constituted a cause of action distinct from that upon

which the judgment of the Industrial Commission was based. Because a prior judgment is *res judicata* only as to demands involving the same cause of action, the denial of the claim under state law could not operate as a judgment in bar of the federal cause. See *Lawlor v. National Screen Service*, 349 U. S. 322, 329 (1955); *Commissioner v. Sunnen*, 333 U. S. 591, 597-598 (1948); *International Ass'n. of Mach & Aero. Wkrs. v. Nix*, 512 F. 2d 125, 131 (5 Cir. 1975); *Shea v. Texas Employers' Insurance Association*, 383 F. 2d 16, 18 (5 Cir. 1967).

III

The employer also contends that the prior action of the State Commission rendered a federal award improper under the "Full Faith and Credit" clause, Art. IV, Section 1, of the Federal Constitution. But even assuming that under the reasoning of *Magnolia Petroleum Co. v. Hunt*, 320 U. S. 430 (1943), the adjudication of a state compensation claim could in some circumstances bar later proceedings under the federal Act, it is obvious, especially from our discussion of the "exclusivity" provision of the Virginia statute, that the reasoning of *Industrial Commission v. McCartin*, 330 U. S. 622 (1947), not *Magnolia*, is controlling in this case, and that no valid "full faith and credit" issue is raised by the federal award.

If "full faith and credit" is invoked by the petitioner "as a vehicle for applying collateral estoppel," *Artrip v. Califano*, 569 F. 2d 1298, 1299 (4 Cir. 1978), then we agree with the Review Board that Virginia's conclusion that Jenkins' disease was not caused by his work⁶ was not, by reason of collateral

6. The precise conclusion of the commissioner who originally heard the state claim was that "[t]here is no sufficient medical evidence presented that the welding smoke caused the underlying condition or caused permanent damage or worsening of this disease of life and it is so found." Appendix at 31. The Industrial Commission affirmed upon the basis that "[t]he evidence failed to establish that the working conditions caused the bronchial condition or aggravated it to the point that the claimant was disabled * * *. Appendix at 32.

estoppel, binding upon the federal finder of fact. The standard of proof required to establish the work-relatedness of Jenkins' injury differed as between the two proceedings. With the possible exception of certain cases involving death, see *Southern Motor Lines Company v. Alvis*, 200 Va. 168, 104 S. E. 2d 735, 738 (1958), Virginia awards compensation only if the claimant proves by "a preponderance of evidence" that his injury arose out of and in the course of his employment. *Conner v. Bragg*, 203 Va. 204, 123 S. E. 2d 393, 396 (1962); *Rogers v. Williams*, 196 Va. 39, 82 S. E. 2d 601, 602 (1954); *Norfolk & Washington Steamboat Co. v. Holladay*, 174 Va. 152, 5 S. E. 2d 486, 488 (1939); *Crews v. Mosley Bros.*, 148 Va. 125, 138 S. E. 494, 495 (1927). "If the evidence shows that it is just as probable that the disability resulted from a cause which is not compensable, as it is that it resulted from one which is compensable, the claimant has not sustained the burden of proof." *Southall v. Eldridge Reams, Inc.*, 198 Va. 545, 95 S. E. 2d 145, 147-148 (1956). In contrast, an administrative law judge considering a claim under the Longshoremen's Act may enter a finding of work-relatedness based upon a less stringent evaluation of the evidence offered by the claimant. See *Young & Company v. Shea*, 397 F. 2d 185, 188-189 (5 Cir. 1968), cert. denied, 395 U. S. 920 (1969); *Strachan Shipping Company v. Shea*, 276 F. Supp. 610, 612-614 (S. D. Tex. 1967), aff'd. per curiam, 406 F. 2d 521 (1969), cert. denied, 395 U. S. 921 (1969); Longshoremen's and Harbor Workers' Compensation Act, § 20, 33 U. S. C. § 920 (1970). See also *Swinton v. J. Frank Kelly, Inc.*, 554 F. 2d 1075, 1081-1084 (D. C. Cir. 1976), cert. denied, 429 U. S. 820 (1976). Relitigation of an issue is not precluded by the doctrine of collateral estoppel where the party against whom the doctrine is invoked had a heavier burden of persuasion on that issue in the first action than he does in the second, or where his adversary has a heavier burden in the second action than he did in the first. Restatement (Second) of Judgments, § 68.1(d), comment f at 38-39, Reporter's Notes at 46 (Tent. Draft No. 4, 1977); *Young & Company*

v. *Shea, supra; In re Four Seasons Securities Laws Litigation*, 370 F. Supp. 219, 232-236 (W. D. Okla. 1974); *Strachan Shipping Company v. Shea, supra*.

IV

As to petitioner's contention that Jenkins' Longshoremen's claim was untimely filed, the facts are undisputed. Jenkins experienced severe coughing spells in December and January, 1973-4, while engaged in welding. He visited the employer's clinic on January 7, 1974, where he was told by a nurse that he had a cold and should avoid welding smoke. On January 14th, the employer's doctor confirmed Jenkins' suspicion that his cough was related to his exposure to welding fumes. Dr. Gillespie diagnosed the problem as "bronchitis aggravated by welding smoke" which would clear up if Jenkins would weld only in open areas. But the coughing recurred, and during his sixth and last visit with the employee on August 30, 1974, the doctor strongly suggested that Jenkins transfer out of welding altogether, telling him that he would be entitled to compensation.

Two of the employer's other physicians thereafter treated Jenkins, but told him that Dr. Gillespie was wrong, that his bronchitis was not occupational, and that it would be compensable only as a personal illness. Jenkins then received some payments under a non-occupational group disability insurance policy and transferred to another department. In September of 1974, the employer's medical director told Jenkins that he had recovered. Planning to return to welding, Jenkins then visited an independent physician. There, in October of 1974, he learned for the first time that he, in fact, had emphysema. This diagnosis was confirmed by several doctors.

Jenkins' Longshoremen's claim was filed in June, 1975, which was more than one year after he was aware that his coughing was work-related, but less than one year after he learned that he had emphysema, not bronchitis. The award that he eventually received was based upon a finding that he had

emphysema. Section 13(a) of the Longshoremen's Act, 33 U. S. C. § 913(a) (as amended, 1972), provides:

"Except as otherwise provided in this section, the right to compensation for disability or death under this chapter shall be barred unless a claim therefore is filed within one year after the injury or death * * *. The time for filing a claim shall not begin to run until the employee or beneficiary is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the employment."

The employer maintains that because Jenkins was aware of the relationship between the welding smoke and his coughing problem in January of 1974, the statute requires that the limitations period be calculated from that date, and as a result that the filing of the claim was untimely. The Benefits Review Board rejected this view, agreeing with the administrative law judge that under the statute the time for filing a claim did not begin to run until October, 1974, when the claimant first learned that his work-related lung condition was not simple bronchitis, but that his "true injury" was emphysema. We affirm.

In conditioning the commencement of the limitations period upon the employee's awareness "of the relationship between the injury * * * and the employment," Section 13(a) obviously presupposes the employee's awareness that "the injury" exists. "Injury" is a term of art, defined to include "such occupational disease or infection as arises naturally out of such employment." 33 U. S. C. § 902(2).⁷ Until an employee is aware, or by the exercise of reasonable diligence should be aware, that he has a disease, he cannot possibly be expected to arrive at a judgment as to whether or not it bears some causal relationship to his work.

Here it is undisputed that Jenkins did not know until October of 1974 that he had the emphysema for which he was eventually

7. The statutory term "injury" also encompasses aggravations of pre-existing conditions. *Baltimore & O. R. Co. v. Clark*, 59 F. 2d 595 (4 Cir. 1932).

awarded compensation. It follows, as a factual matter, that he was not aware until at least that time of the relationship between the emphysema, or its aggravation, and his employment. Concededly, there is nothing talismanic about the medical name of a disease, and if Jenkins had been apprised earlier of the distinctive features, but not the name, of his affliction, he might reasonably have been expected to have also sooner obtained or formed some opinion as to its work-relatedness. But such was not the case. In the months preceding October, the claimant was consistently told that he had bronchitis, an infectious disease which he was informed would improve and could be cured with medical care; this condition differs markedly in its nature and likely consequences from emphysema, a disease found by the administrative law judge to be of a serious nature, and which would prevent Jenkins from resuming his trade. The Act does not require an employee to timely file a claim based upon a misdiagnosis in order to preserve his right to compensation for the more drastic disability which a correct diagnosis later shows resulted from the injury. *See Cooper Stevedoring of La., Inc. v. Washington*, 556 F. 2d 268 (5 Cir. 1977); *Stancil v. Massey*, 436 F. 2d 274 (D. C. Cir. 1970).⁸

The petitioner emphasized, however, that at the outset of the administrative hearing claimant's counsel agreed with the statement that the "date of injury" was January 7, 1974. Notwithstanding the proof that it was not until October that Jenkins was aware of the nature and gravity of his true injury, it is contended

8. That the claimant was in fact unaware of his true injury until October is not necessarily dispositive of the limitations issue. Jenkins could not sit on his rights, and if, in the exercise of reasonable diligence, he *should* have known earlier that he had emphysema instead of bronchitis, then the timeliness of his claim would turn upon the further question of when he should have been aware that it was work-related. Here, however, the employer does not argue that Jenkins was remiss in not obtaining a diagnosis of emphysema earlier. Such a contention would fail in any event in view of the claimant's repeated consultations with the petitioner's own medical experts and their misdiagnoses. *See Cooper Stevedoring of La., Inc. v. Washington*, *supra*; *Stancil v. Massey*, *supra*; *Aerojet-General Shipyards, Inc. v. O'Keefe*, 413 F. 2d 793 (5 Cir. 1969).

that this agreement of counsel amounted to an oral stipulation which was binding on the administrative law judge that the filing period began to run on January 7, 1974.

From a review of the record, we are not convinced that the claimant intended this statement to mean anything more than that he was exposed to the welding smoke on January 7th and realized then that his coughing was associated with such exposure. Our discussion above of the application of Section 13(a) to the facts of this case demonstrates that there is nothing inconsistent between this admission and the conclusion that the statutory filing period commenced in October. While a literal reading of the first sentence of Section 13(a) might mechanically be applied to counsel's statement in a manner which would support the employer's argument, such an application would ignore the last sentence of the Section which is addressed to cases of this kind. The administrative law judge obviously did not interpret counsel's statement as foreclosing inquiry into the factual question of when the claimant first became aware that his condition was serious, and in view of the overwhelming evidence which supports the factfinder's conclusion on that issue we are not inclined to set it aside.

V

Finally, the petitioner argues that substantial evidence did not support the finding of a causal relationship between Jenkins' employment and his emphysema or the aggravation thereof. It cites as error the administrative law judge's refusal to credit the testimony of the employer's medical director, Dr. Stallard, who opined at the hearing that Jenkins' lung condition resulted from cigarette smoking and was "not precisely related to his welding exposure."

Although in our opinion the medical evidence was not overwhelmingly in favor of either the claimant or the employer, it is not the province of this court to set aside an administrative law judge's finding as to work-relatedness if it is consistent with the

law and supported by substantial evidence in the record considered as a whole. *Cardillo v. Liberty Mutual Insurance Co.*, 330 U. S. 469, 477-478 (1947). Here, Jenkins testified that his symptoms did not predate his employment, and there was no evidence that he had the disease even at the time of his pre-employment physical. There was no dispute that his respiratory difficulties became symptomatic only after he was exposed to welding smoke at work, and expert medical testimony, including that of Dr. Stallard, established that it is possible for welding smoke to aggravate the condition of emphysema, particularly in a person who may be suffering from a pre-existing, smoking-related breathing problem. That Jenkins now suffers permanent lung damage, emphysema, is conceded by even Dr. Stallard. In light of the express statutory presumption that an injury arising during the course of employment is compensable, 33 U. S. C. § 920(a),⁹ we are of the opinion that, "in the absence of substantial evidence to the contrary," this evidence was sufficient to support the finding of causation and to justify an award upon the basis that the welding smoke either caused or aggravated the employee's respiratory condition. *See Swinton v. J. Frank Kelly, Inc., supra*, 554 F. 2d at 1082-1085; *Wheatley v. Adler*, 407 F. 2d 307, 312-314 (D. C. Cir. 1978); *Marra Bros. v. Cardillo*, 154 F. 2d 357 (3 Cir. 1946).

Order Affirmed.

9. Section 20 of the Longshoremen's Act, 33 U. S. C. § 920, provides in part:

"In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this chapter."

APPENDIX B.

U. S. DEPARTMENT OF LABOR

Benefits Review Board

Washington, D. C. 20210

Filed as Part of the Record

May 13, 1977

Sammy J. Jenkins
Claimant-Respondent

vs.

Newport News Shipbuilding and Dry
Dock Company
*Self-Insured Employer-
Petitioner*

BRB No. 76-367

DECISION

Director, Office of Workers' Compen-
sation Programs, United States
Department of Labor

Party-in-Interest

Appeal from the Decision and Order of Charles F. Simon,
Administrative Law Judge, United States Department of
Labor.

Robert A. Blount, Hampton, Virginia, for the claimant.

William McL. Ferguson (Ferguson & Mason), Newport News,
Virginia, & Luther G. Jones (Seyforth, Shaw, Fairweather
& Geraldson), Washington, D. C., for the employer.

Joshua T. Gillelan, II (William J. Kilberg, Solicitor of Labor,
Laurie M. Streeter, Associate Solicitor), Washington, D. C.,
for the Director, Office of Workers' Compensation Programs,
United States Department of Labor.

Before: Washington, Chairperson, Hartman and Miller,
Members.

Hartman, Member:

This is an appeal by the employer from a Decision and Order (76-LHCA-169) of Administrative Law Judge Charles F. Simon in a claim filed pursuant to provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U. S. C. § 901 *et seq.* (hereafter referred to as the Act).

Claimant worked for employer as a welder from July 1971 to July 1972 and from August 1973 until October 1974. In late December 1973 and in January 1974, claimant experienced respiratory difficulties after inhaling welding fumes. Claimant experienced other episodes of breathing difficulties during 1974, and was transferred to the fabrication shop in September 1974 where the environment was less smoky. In October 1974, claimant was diagnosed by Dr. Sim as suffering from chronic bronchitis/emphysema. Claimant left work in October 1974 and filed a claim for compensation for alleged breathing difficulties related to his employment under the Virginia workmen's compensation act. After this claim was denied, claimant filed under the Act.

The administrative law judge awarded benefits for a 60% temporary partial disability to continue up to five years, concluding that claimant's breathing difficulties were causally related to his employment, that his federal claim was timely filed, and that Virginia's denial of his state claim did not bar a claim under the Act.

Employer appeals contending that the assumption of jurisdiction by the Virginia Industrial Commission at claimant's request precludes him from asserting the same claim in the federal forum, that the claim was not timely filed, and that the claimant was not permanently disabled by the aggravation of a pre-existing condition.

Employer first contends that the claim under the Act is barred by the decision of the Virginia Industrial Commission which after assuming jurisdiction at claimant's insistence denied his claim on the merits. In support of its contention, employer

relies on *Windrem v. Bethlehem Steel Corp.*, 293 F. Supp. 1 (D. N. J. 1968), where a claimant who had successfully pursued an award under the New Jersey workmen's compensation act was barred from pursuing a claim under the Act by the doctrines of election of remedies and collateral estoppel. However, *Windrem* should not control the result here.

Windrem was decided prior to the 1972 amendments and appears to be predicated on the concept that once a state decision on a claim's merits was made, a binding election had been made in that the federal law under unamended Section 3(a), 33 U. S. C. § 903(a), applied only if "recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law". Not only was this language deleted by the 1972 amendments, but the Supreme Court in *Calbeck v. Travelers Ins. Co.*, 370 U. S. 114 (1962), had already read this language as permitting concurrent, not exclusive, jurisdiction in many cases. Case law following *Calbeck* clearly has indicated that where there is a state decision on the merits followed by a later federal decision finding coverage, there has been no election remedies and the federal decision is given precedence, provided appropriate credit for the state award is given. See Larson, Workmen's Compensation Law § 89.53(b); Gilmore & Black, The Law of Admiralty, 424-26, 431-34. See also *McCabe v. Ball Builders, Inc.*, 1 BRBS 290, BRB No. 74-181 (Jan. 31, 1975).

Further, even where two state decisions are concerned, a prior state decision in one forum does not bar a later decision in another forum if the jurisdictional issue was never fully considered in the first proceeding. In this case, unlike *Windrem*, employer while doubting that Virginia was the proper forum nonetheless acquiesced in the proceeding and therefore should be precluded from asserting that the Virginia decision controls. *Durfee v. Duke*, 375 U. S. 106 (1963).

Concerning the actual findings of fact of the Virginia Industrial Commission on which the claim was denied, these findings

are not binding on the federal claim. Where the standards of proof between two proceedings vary greatly, as appears to be the case here, the prior conclusions of the Virginia Industrial Commission do not have a binding effect on the conclusions that the administrative law judge may reach. *Young & Co. v. Shea*, 397 F. 2d 185 (5th Cir., 1968), *cert. denied*, 395 U. S. 921 (1969). Moreover, a prior decision denying benefits cannot be treated under the Act as conclusively barring a second claim. Section 22 of the Act, 33 U. S. C. § 922, provides that a claimant can seek modification of a prior decision alleging a mistake of fact or a change of condition. See *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U. S. 254 (1971).

Employer next contends that the claim was not timely filed under Section 13, 33 U. S. C. § 913. The record discloses that the first episodes of breathing difficulties took place in late December 1973 and in early January 1974. An official claim was not filed until June 1975.

At the hearing, employer stipulated "the date of injury—or the date of knowledge of his condition—was January 7, 1974." Claimant's attorney agreed to this stipulation. The administrative law judge treated this stipulation as the date claimant's bronchial problem first manifested itself. Employer argues that such an interpretation was improper and that this date must be accepted as the date claimant had knowledge of a relationship between his injury and his employment, and hence the one year statute of limitations began to run from this date.

It would appear from the record that this stipulation was not seen as controlling the question of whether the statute of limitations barred the claim. It is clear that the question of when claimant knew his lung condition was not an isolated coughing episode, but rather a definite long term impairment related to his employment was very much in issue at the hearing and was fully litigated by the parties.

Further, an acceptance of the stipulation of January 7, 1974, as the date of injury would be contrary to the concept of when

an injury occurs for the application of the statute of limitations. When claimant was first injured, he was only aware that his bronchial problems which lasted at that time for approximately a week were work related, but he had no reasonable expectation that this was to be a recurring problem that may well affect his earning capacity. Rather, the date of injury for the purpose of the statute of limitations is the date the occupational disease manifests itself to a physician rather than an unschooled claimant. *Aerojet-General Shipyards, Inc. v. O'Keeffe*, 413 F. 2d 793 (5th Cir. 1969). In this case, the existence of an occupational disease, rather than mere coughing episodes, was not apparent until it was diagnosed by Dr. Sim in October 1974, in which case the claim was timely filed.

Further, even if it was said that Dr. Gillespie, the plant doctor, indeed informed claimant he had a work-related occupational disease in January of 1975, the fact that this opinion was later contradicted by Dr. Harmon (another plant doctor) and Dr. Stallard (the head plant doctor), both of whom told claimant that his condition was personal and not compensable, would in effect move the date of injury forward until a proper diagnosis that claimant could rely on was made, i.e., when Dr. Sim diagnosed his condition in October 1974. See *Stancil v. Massey*, 436 F. 2d 274 (D. C. Cir. 1970.)

In addition, the record discloses that after his January 1975 examination by Dr. Gillespie, claimant was given a claim form at the clinic. After filling out this form, he testified that he returned the form to a woman who worked at the clinic. Apparently, she stated that although it was not her job, she would mail the form to the deputy commissioner. This claim form was never received by the deputy commissioner. In that a clinic employee should logically be construed to be an agent of the employer, her actions should bar employer from alleging that the claim was not timely filed. See *Blackwell Constr. Co. v. Garrell*, 352 F. Supp. 192 (D. D. C. 1972).

Employer further contends that claimant is not permanently disabled due to an aggravation of a pre-existing condition.

Rather, it contends that any aggravation in claimant's condition was temporary, non-disabling in nature and due to claimant's cigarette smoking.

The record indicates that claimant either had no bronchial problems at the time he was hired by employer or that he was symptom free of any prior respiratory condition at the time he was hired. It is also clear from the record that claimant now suffers from emphysema and/or chronic bronchitis. The Act provides a presumption that in the absence of substantial evidence to the contrary, claimant's condition is causally related to his employment. *Swinton v. J. Frank Kelly, Inc.*, No. 74-1164 (D. C. Cir. Feb. 3, 1976), cert. denied, 97 S. Ct. 67 (1976); 33 U. S. C. § 920(a). Dr. Stallard did testify that claimant's lung condition was not related to his welding exposure, the duration and intensity not being strong enough to have a permanent effect. However, Dr. Stallard did not know what length of exposure would cause this effect. The administrative law judge, as is his prerogative, rejected this testimony. *Todd Shipyards Corp. v. Donovan*, 300 F. 2d 741 (5th Cir. 1962). The administrative law judge concluded that employer had not introduced evidence sufficient to rebut the presumption. We agree.

Further, in contrast to Dr. Stallard's testimony, Dr. Moore indicated that claimant's breathing problems were probably due to his cigarette smoking but they were also probably aggravated by his exposure to welding fumes. The aggravation of a preexisting condition is, of course, compensable under the Act. *Wheatley v. Adler*, 407 F. 2d 307 (D. C. Cir. 1968).

As concerned the nature and extent of claimant's injury, the administrative law judge noted that the record contained no recent medical evaluation of claimant's condition. However, claimant did testify that he had continued breathing difficulties and the record demonstrates a checkered record of employment since leaving employer. Claimant indicated that he had lost several of these jobs (ambulance attendant, mason, building supplies handler, welder) as a result of his lung condition.

The administrative law judge found claimant's average weekly wage at the time of injury to be \$175.15. Applying Section 8(c)(21) and 8(h), 33 U. S. C. § 908(c)(21) and (h), he concluded that claimant's post-injury earnings did not fairly and reasonably represent this wage-earning capacity. Averaging claimant's earnings from his various employments, he found that claimant had experienced a reduction of \$98.44 per week in earnings. The administrative law judge also noted the claimant's condition precluded his work as a welder, and that claimant's emphysema by nature is a limiting disease.

Considering these factors, the Board concludes that there is substantial evidence in the record to support an award of compensation for a sixty percent temporary partial disability, to run until further order or until the expiration of five years.

Employer during the pendency of the appeal, has requested that the case be remanded for the introduction of new evidence concerning claimant's breathing impairment and wage-earning capacity. This new evidence can be introduced only by means of a petition for modification filed pursuant to Sections 22 and 19, 33 U. S. C. §§ 922 and 919. The petition for modification cannot be introduced at the appellate level, and a remand at this point based on this petition for modification is not warranted.

Accordingly, the administrative law judge's Decision and Order is affirmed.

/s/ Ralph M. Hartman

Ralph M. Hartman, Member

/s/ Ruth V. Washington

Ruth V. Washington, Chairperson

We Concur:

/s/ Julius Miller

Julius Miller, Member

Dated this 13th day of May, 1977.

U. S. DEPARTMENT OF LABOR
 Benefit Review Board
 Washington, D. C. 20210

Sammy J. Jenkins, <i>Claimant-Respondent,</i> vs. Newport News Shipbuilding and Drydock Company, <i>Self-Insured Employer-</i> <i>Petitioner,</i> Director, Office of Workers' Com- pensation Program, United States Department of Labor, <i>Party-in-Interest.</i>	}	BRB No. 76-367
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ORDER

Employer has moved that the Board reconsider its Decision in ~~this~~ appeal. The Board grants this motion. 20 C. F. R. § 802.409.

The Board has fully reconsidered its Decision in light of employer's arguments. The Board hereby orders that:

1. On page 6, line 4, the figure "1975" should be "1974."
2. On page 6, line 12, the figure "1975" should be "1974."
3. On page 7, line 11, the word "strong" should be "long."
4. On page 7, line 20, the phrase "probably aggravated" should be "possibly aggravated."

In all other respects, the decision is affirmed.

/s/ Ruth V. Washington, Ruth V. Washington <i>Chairperson</i>	/s/ Ralph M. Hartman Ralph M. Hartman <i>Member</i>	/s/ Julius Miller Julius Miller <i>Member</i>
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Dated this 7th day of July, 1977.

APPENDIX C.

U. S. DEPARTMENT OF LABOR
 Office of Administrative Law Judges
 Suite 700—1111 20th Street, N.W.
 Washington, D. C. 20036

In the matter of

Sammy J. Jenkins, <i>Claimant,</i> vs. Newport News Shipbuilding and Drydock Company, <i>Self-Insured Employer.</i>	}	Case No. 76-LHCA-169 OWCP No. 5-11005
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For the Employer

Before: Charles F. Simon
 Administrative Law Judge

DECISION AND ORDER**Statement of the Case**

Pursuant to the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. 901 *et seq.* (hereinafter referred to as the Act), and the Rules and Regulations promulgated thereunder (20 C. F. R. Parts 701 and 702), this matter was heard before me on December 12, 1975, in Norfolk, Virginia. Both parties were afforded full opportunity to be heard, to adduce evidence, to examine and cross-examine witnesses, to make oral argument, and to present briefs. Briefs have been submitted. Post-hearing exhibits have been received from both Counsel and marked as follows: Employer's Exhibit 7, pp. 1 and 2; and Claimant's Exhibits 8, pp. 1-3, 9, pp. 1-6, and 10. These Exhibits have been placed in the Exhibit File and are hereby received into evidence. Counsel for Claimant has filed a statement of services rendered to Claimant in support of an application for an award of attorney's fees. These documents have been duly considered and are hereby made a part of the record in this case. Based upon the entire record herein and my observation of the witnesses and their demeanor, I make the following Findings of Fact, Conclusions of Law, and Order.

Issues

The issues presented by this case are: (1) Jurisdiction under the Act in view of the adjudication of the claim by the Virginia Industrial Commission; (2) Whether or not Claimant has timely filed his claim for compensation; (3) Nature and extent of injury or occupational disease; (4) Causal relationship between Claimant's condition and his employment; (6) Average weekly wage; (6) Nature and extent of disability; (7) Liability of Employer for compensation, medical costs, penalties, interest and attorney's fees.

Stipulations

Counsel for the parties have stipulated and it is so found, that Claimant was an employee of the Employer and was working in an area covered by the Act on January 7, 1974, which was the date when Claimant began having serious respiratory symptoms. This was not the date of the injury however, since Claimant's occupational disease was not diagnosed by a doctor until about October 1, 1974.

Findings of Fact

Claimant, Sammy J. Jenkins, is 31 years old, married and has five minor children. His wife works (Tr. 118). He has an 8th grade education and has worked since about age 15. His main work has been as a construction worker, a worker in a textile plant, work as a rock driller, and, since 1971, a welder for Employer.

Claimant now has mild to moderate obstructive airway disease, which is another way of saying he has emphysema (Tr. 152). He has not worked for Employer since October, 1974, which was shortly after his emphysema was first diagnosed. The basic factual question is whether Claimant's current respiratory condition was caused or aggravated by his employment as a welder for Employer.

Claimant had the croup as a child and had been a moderate cigarette smoker (12-15 cigarettes per day, Tr. 48) from about age 18 to March of 1975 (about 12 years), when he practically quit smoking. Apparently he still smokes a few cigarettes a day (Tr. 110, 111).

Claimant was employed by Employer on July 28, 1971, and was graduated from welding school a month later. His pre-employment physical showed no symptoms of any disease (Tr. 144-146). A chest x-ray taken at the time showed some scarring in the lungs but no evidence of damage due to work in a cotton

mill or as a rock driller. A tuberculosis test was negative. There have been 6 x-rays of Claimant's lungs since July, 1971, and they are all basically the same as the first one (Tr. 151).

On June 22, 1972, Claimant became sick from welding fumes and reported to Employer's clinic (Cl. Exh. 6). He was restricted to work in the open for 1 day. This appears to be the only relatively serious respiratory problem suffered by Claimant during his first period of employment for Employer. On July 13, 1972, he was fired for unexcused absence. He was gone for about a year, working first in Detroit for a short period, and then later in a textile mill in Carolina, and as a welder for a construction company.

On March 23, 1973, Claimant joined the National Guard of South Carolina and his enlistment exam (Joint Exh. 3) declared him to be "Healthy". However, Claimant indicated on the examination form (p. 1) that he didn't know whether or not he had ever had asthma. He explained that at the time he thought that croup was considered to be asthma (Tr. 49), so he was uncertain as to how to answer the asthma question. Apparently this response on the exam was not considered significant by Dr. Ernest A. Perry, who conducted the National Guard examination, and, in view of Claimant's explanation, I do not consider it as being of any significance. Dr. Perry certified on March 26, 1975 (Cl. Exh. 1) that the National Guard exam in March of 1973, showed no evidence of pulmonary emphysema.

On August 8, 1973, Claimant was rehired as a welder by Employer and passed another pre-employment physical exam (Cl. Exhs. 2 and 3, pp. 1 and 2). He did not notice any particular problems with his respiratory system until late December 1973, at which point the welding smoke and cigarettes started to cause more coughing.

On January 7, 1974, Claimant was working in a ship when he lost his ventilation and the welding smoke gave him a severe coughing spell. He went to Employer's clinic and the nurse said he just had a cold, gave him aspirin, sent him back to work, and

told him to avoid smoke. A week later, January 14, 1974, Claimant inhaled more welding smoke followed by coughing and this time he saw Employer's doctor, Barnes Gillespie, M.D., who said he had "bronchitis aggravated by welding smoke" (Joint Exh. 2). He was restricted to work in a less smoky area for a week and urged to stop smoking cigarettes.

This was the first of a series of 1974 visits by Claimant to Employer's doctors, as his respiratory problems continued. He saw Dr. Gillespie on 3 occasions in January 1974, on March 18, 1974, June 14, 1974, and August 30, 1974. Dr. Gillespie considered Claimant's trouble to be a "occupational illness". He recommended that Claimant do welding only in open areas or transfer to another type of work (Cl. Exh. 3, pp. 3, 5, 6 and Exh. 7).

Although Claimant's superiors moved him to areas where most of his work would be in the open, there were occasions when he had to work in closed areas and the smoke would bother him. Finally in August of 1974, Claimant said he would accept a transfer to different work and Dr. Gillespie told him he could get some type of compensation (Tr. 61).

From this point on Claimant saw Employer's Doctors Harmon and Stallard. He did get to transfer to a different job, but these doctors told him his condition was not compensable except as a "personal" illness (Cl. Exh. 3, pp. 8, 12, 13, 14) (Tr. 63). He did receive some compensation from Aetna Insurance Company, Employer's group insurance carrier (Tr. 64). However, the new work in the M-22 fabrication department was not a clean environment and Claimant continued to have respiratory problems (Tr. 64).

After Dr. Stallard (Clinton W. Stallard, M.D., Medical Director for Employer) had conducted tests and given Claimant medication, he told Claimant his problem had cleared up and there was nothing wrong with him (Tr. 65). Claimant then wanted to go back to welding to get the extra pay, but first he went, on his own, to Peter A. Sim, M.D., of the Newport News

Health Center. The date of this visit is not in the record, but it must have been in late September or early October of 1974 (Tr. 112). On October 15, 1974, Dr. Sim wrote a letter (Empl. Exh. 2, p. 5) regarding his patient Sammy Jenkins, stating that Claimant had a "mild compromise in respiratory function". Claimant testified that Dr. Sim told him he had emphysema (Tr. 65, 89, 112). Dr. Sim also stated in a report dated January 10, 1975 that Claimant had "chronic bronchitis/emphysema" (Cl. Exh. 5).

After seeing Dr. Sim, Claimant apparently told Employer that he had emphysema and Employer would not allow him to go back to welding (Tr. 65). Claimant then continued work for some weeks but finally quit working for Employer sometime in October, 1974. The exact date is not in the record, but on page 15 of Claimant's brief it is stated that he started work for Huston Ambulance Company on October 24, 1974 (Cl. Exh. 10). Since then Claimant has worked at seven different jobs and was working as a busdriver at the time of the trial. He says he feels bad in the mornings but is able to do his work (Tr. 116, 117). He takes medication for "wheezing" (Tr. 115, 116).

Since the initial diagnosis by Dr. Sim, several other doctors have diagnosed emphysema in Claimant. Ralph Price, M.D., in a report apparently misdated February 7, 1974 (should be 1975), gave a diagnosis of "chronic emphysema and bronchitis". This physical exam appears to have been conducted under the auspices of the Newport News Department of Vocational Rehabilitation. (See p. 1 of Cl. Exh. 4.) On May 9, 1975, Claimant was examined by Laurie W. Moore, Jr., M.D., who was referred to by Claimant as a "lung specialist" (Tr. 117). Dr. Sim had referred Claimant to Dr. Moore. His pulmonary function tests showed that Claimant had mild to moderate obstructive airways disease (emphysema), which Dr. Moore felt was related to long term cigarette smoking and which "may well have been aggravated by fumes from welding" (Empl. Exhs. 5 and 6).

In view of his position as Employer's Medical Director, I consider the testimony of Dr. Stallard to be most significant.

In his letters of January 15 and February 4, 1975 (Empl. Exh. 2, pp. 4 and 18), Dr. Stallard stuck with the position that Claimant merely had chronic bronchitis which was not of industrial causation and which pre-existed his employment with Employer. However, after he learned of the diagnoses, of emphysema by Dr. Moore and others, Dr. Stallard, in his testimony at the trial, had to make several concessions, including the following:

1. Claimant was free of any evidence of disease at the time of his first pre-employment examination in 1971 (Tr. 144, 145). There was no evidence of lung problems due to textile fibers or rock dust (Tr. 145, 146).

2. Although Claimant gave no history of respiratory problems at the time of his pre-employment examinations, and the examinations themselves showed no pre-existing respiratory problems, Dr. Stallard believes that Claimant actually had a long history of respiratory problems. Dr. Stallard is positive that when Claimant came to work for Employer, Claimant had a pre-existing condition, which could and perhaps did lead to his disease, emphysema (Tr. 180, 181).

3. Dr. Stallard agrees with Dr. Moore and the other doctors, that Claimant has emphysema. However, his opinion is that said disease was not caused by Claimant's "short" exposure to welding smoke (Tr. 152, 156, 178).

4. Welding smoke could cause bronchitis (Tr. 147). Bronchitis is inflammation of the bronchi. Emphysema could be caused by recurrent or chronic inflammation (Tr. 148).

5. Claimant's symptomatology developed after he had been assigned as a welder (Tr. 155).

6. There is record permanent damage to Claimant's lungs (Tr. 156), but Dr. Stallard is of the opinion that this damage "is not precisely related to his welding exposure." He feels that the duration of the exposure plus its intensity was not sufficient to have produced a permanent effect (Tr. 157).

It has been stipulated that the "injury" in this case, or more appropriately, the first manifestation of Claimant's occupa-

tional disease, occurred on January 7, 1974. His claim for compensation under the Act was not filed with the Deputy Commissioner until on or about June 4, 1975 (Joint Exh. 1). Consequently, Employer takes the position that the claim was not timely filed. Employer did file a report of injury on January 28, 1974 (Empl. Exh. 1). Employer also, on January 14, 1974, provided Claimant with 3 copies of Form LS-201, which is the form to be filed by the employee, entitled "Notice of Employee's Injury or Death".

Claimant acknowledged receiving 3 copies of said form which he took home and filled out and then brought two copies back to Employer's medical offices some time shortly after January 14, 1974. He asked one of the girls in the admitting office at the Employer's clinic to mail the form to the proper place and she agreed to do it (Tr. 54-56, 84-88, 119-124, and Empl. Exh. 2, p. 22). There is no evidence that the Form LS-201 ever got filed with the Deputy Commissioner. However, in addition to Claimant's testimony regarding the form, a copy which he kept for himself was later filed with the Virginia Industrial Commission (Empl. Ex. 2, p. 22). Claimant explained (Tr. 85) that he had dated said form January 14, 1973 when the correct date was January 14, 1974.

Although Claimant did suffer from smoke inhalation on January 7, 1974, he had no indication or knowledge at that time that he had a compensable injury under the Act. He continued to work and was encouraged to believe that his "bronchitis" would be improved or perhaps eliminated if he could do his welding in a more open and cleaner environment.

It was not until August of 1974 that Dr. Gillespie strongly recommended that Claimant transfer out of welding (Cl. Exh. 7) and at that time he told Claimant he would be entitled to compensation (Tr. 61). However, Claimant did not get to see Dr. Gillespie again and Doctors Harmon and Stallard told him that bronchitis was not compensable (Tr. 63, 64 and Cl. Exh. 3, pp. 8, 12, 13, 14). Some short time later, Dr. Stallard told

Claimant he was completely recovered (Tr. 65). This encouraged Claimant to return to welding, but before doing so, he saw Dr. Sim (in September or October of 1974) who diagnosed Claimant's illness as emphysema. So it was not until the Fall of 1974 (about October 1) that Claimant knew he had a serious disease. This, of course, was less than a year before he filed his claim under the Act in June of 1975.

After he quit working for Employer in October of 1974, Claimant had several different jobs, but was out of work in January of 1975. At this time he went to the Newport News Department of Vocational Rehabilitation and talked with a Mr. Fannin who suggested that he file a compensation action against Employer. Claimant felt there was no use doing this because he had been told by Employer's doctors that his disease was not compensable. Mr. Fannin, however, felt he was entitled to compensation, so he helped Claimant write a letter to the Virginia State Industrial Commission (Tr. 71, 72, 94, and Empl. Exh. 2, p. 1). The full record of the Virginia State proceeding is contained in Employer's Exhibit 2, pp. 1-46. Claimant's claim was denied and Claimant was told at a hearing on June 4, 1975 (Tr. 98), in Richmond, Virginia, by one of the Commissioners, that he was in the wrong forum, that this was a Federal case (Tr. 73, 100). After this Claimant proceeded to try to make recovery under the Act (Tr. 73, 96) and filed his claim the same day, June 4, 1975 (Joint Exh. 1 and Cl. Exh. 9, p. 4).

Conclusions of Law

1. Claimant filed a claim for compensation initially under the Virginia state workmen's compensation law (Empl. Exh. 2, p. 1) and his claim there was denied, first by a single Commissioner (Empl. Exh. 2, pp. 35-37), and later, on appeal, by the Virginia Industrial Commission (Empl. Exh. 2, pp. 45, 46). These decisions were made on the merits and not on the basis of lack of jurisdiction, although the Virginia Commission and Employer's counsel agreed at the hearing on June 4, 1975, that

the situs of the original injury on January 7, 1974, brought the case under Federal jurisdiction (Tr. 73, 100). Employer now argues that the Virginia proceeding was a final adjudication precluding further action under the Act.

Claimant was a welder for Employer, one of the largest shipbuilding operations in the world. The evidence shows that most if not all of his work was done aboard ships which were under construction. Thus, it cannot be argued, and Employer makes no attempt to argue, that Claimant was not an "employee" "engaged in maritime employment" under the terms of Section 2(3) of the Act.¹ So we have no question of jurisdiction under Federal law. The argument is that Claimant, having chosen to proceed under State law, and losing there, is now precluded from making a claim for compensation under the Act. This argument has no merit where there is clear jurisdiction under the Federal statute.

As the Court stated in *Calbeck v. Travelers Ins. Co.*, 370 U. S. 114, 82 S. Ct. 1196, 8 L. Ed. 2d 368 at 371 (1962):

Our conclusion is that Congress invoked its constitutional power so as to provide compensation for all injuries sustained by employees on navigable waters whether or not a particular injury might also have been within the constitutional reach of a state workmen's compensation law.

Larson, in his treatise, *Workmen's Compensation Law*, Sec. 89, states as follows:

An injury that occurs upon the navigable waters of the United States is always covered by the Longshoremen's [Federal] Act. It is also subject to concurrent coverage by state acts in some cases.

In *McCabe v. Ball Builders, Inc. and Travelers Insurance Company*, 1 BRBS 290, BRB No. 74-181 (Jan. 31, 1975), the Benefits Review Board stated (Decision, pp. 4 and 5):

1. Once a claimant is deemed to be an "employee" his employer is automatically an "employer" under Section 2(4) of the Act. *Ford v. P. C. Pfeiffer Co., Inc.*, 1 BRBS 367 (1975).

The fact that compensation may be received under a state law does not preclude coverage under the Act. . . . This Board has already held that *all* injuries sustained by employees on navigable waters are compensable under the Act regardless of whether there is also an available remedy under state law. *Gilmore v. Weyerhaeuser Co.*, 1 BRBS 180, BRB No. 74-141 (Nov. 12, 1974). (Emphasis supplied by BRB.)

2. Employer next argues that since there was more than a year between the date of the "injury" (Jan. 7, 1974) and the date the claim was filed (June 4, 1975), the claim is barred because of the one-year statute of limitations provided by Section 13(a) of the Act. This claim is similarly without merit. There is no evidence that Claimant had respiratory problems prior to his employment with Employer in 1971, although one of Employer's staff doctors (Stallard) testified that he was sure there had been a pre-existing lung condition. At the time of the stipulated injury, Claimant knew that his severe coughing was work-related, but he did not know he had a serious lung disease. Employer's doctors diagnosed bronchitis, which is normally an infectious disease which clears up with medical care. In about September or October of 1974, Employer's medical director, Dr. Stallard told Claimant he was completely well. Shortly thereafter, Dr. Sim diagnosed emphysema. So Claimant was not aware of the seriousness of his condition until about October of 1974, which was less than a year before he filed his claim under the Act.

The case of *Aerojet-General Shipyards, Inc. v. O'Keeffe*, 412 F. 2d 793 (1963), holds that a claim for occupational disease accrues only when the cumulative effects of exposure manifest themselves and further that "The effects must manifest themselves to a physician rather than to an unschooled employee before limitations begin to run." Claimant's emphysema was not manifest to a physician until October of 1974.

The cases involving latent injuries would also be applicable in this case. In *Stancil v. Massey*, 436 F. 2d 274 (1970) the

claimant injured his back and the employer's doctor diagnosed the injury as mild back sprain. He was treated, discharged, and told he had no further disability. However, he suffered recurrent back pains and finally had surgery in 1962 for a ruptured disc caused by the original accident in 1959. His claim for compensation under the Act, filed on June 20, 1963, was held to be timely filed. The facts in the instant case are very similar, particularly the failure of Employer's doctors to diagnose Claimant's emphysema. As stated by the Court in *Stancil*, 436 F. 2d at 277:

. . . The rationale is that it is unfair to bar the victim's recovery when he has not had a reasonable opportunity to file his action because he did not know his true injury.

Also on p. 277, the Court stated:

We think that the canon of liberal construction . . . instructs that "injury" should encompass physical harm of a kind which is unknown to the employee at the time of the accident but which is later revealed, such as an occupational disease or latent injury.

Also see *Washington v. Cooper Stevedoring Company and Employers National Insurance Company*, 3 BRBS 474, BRB No. 75-237 (May 10, 1976) and cases cited therein.

I hold that the date of the injury in this case was not January 7, 1974, as stipulated by the parties. There was no knowledge of the "true injury" of Claimant until October of 1974, when Dr. Sim diagnosed emphysema. Consequently, the claim was filed within the statutory period.

A further point which could be relied on by Claimant in opposition to the statute of limitations defense, is the fact that Claimant was persistently told by Employer's doctors that he had no compensable claim. Claimant, in his ignorance of these matters, accepted these statements as true, and did not consider taking any action for compensation until being advised to do so by his vocational rehabilitation adviser in January of 1975, 3 months after the emphysema diagnosis. The medical misdiagnoses by said doctors coupled with their inaccurate advice as to

Claimant's legal rights to workmen's compensation benefits, would also serve to toll the statute of limitations.

3. The evidence is clear that Claimant has a serious occupational disease, emphysema, which was first diagnosed while he was working for Employer. Dr. Moore's report (Empl. Exh. 6) says his emphysema is "mild to moderate", which is serious for a person of his age (31). Aging alone causes diminution of pulmonary reserve, so regardless of how careful he is, Claimant's condition will become more serious at an earlier age than for most people (Tr. 183, 184). Dr. Stallard said he could not judge as to the rate of progression of Claimant's disease (Tr. 184).

4. I have no doubts on the question of causal relationship between Claimant's respiratory condition and his employment. Except for croup as a child, there was no evidence that Claimant had any significant respiratory problems before he was first employed by Employer in 1971. He had one instance of trouble with welding fumes in 1972. His serious and persistent problems began in December of 1973 in the course of his employment, and have continued to the date of the trial.

Section 20(a) of the Act [33 U. S. C. A. 920(a)] provides an express statutory presumption that a claim comes within the provisions of the Act. This presumption is an illustration of the humanitarian nature of the act, *O'Keefe v. Smith Associates*, 380 U. S. 359 (1965). When an illness occurs in the course of employment, the presumption that it arises out of the employment is strengthened, with doubts resolved in favor of the Claimant, *Wheatley v. Adler*, 407 F. 2d 307 (D. C. Cir. 1968). Section 20(a) places the burden on the employer to go forward with evidence to rebut the presumption. In order to accomplish this end, the kind of evidence produced must be such as a reasonable mind might accept to support a conclusion, *McGrath v. Hughes*, 264 F. 2d 314 (2nd Cir. 1959); cert. denied, 360 U. S. 931 (1959). The evidence needed to rebut the presumption must consist of facts, not speculation, and reliance upon

mere hypothetical probabilities in rejecting a claim is contrary to the presumption, *Steele v. Adler*, 269 F. Supp. 376 (D. C. D. C. 1967). Also of significance, is the statutory policy that all doubtful fact questions are to be resolved in favor of the injured employee, because the intent of the statute is to place the burden of possible error on those best able to bear it, *Young and Company v. Shea*, 397 F. 2d 185 (5th Cir. 1968); rehearing denied, 404 F. 2d 1059 (5th Cir. 1968); cert. denied, 395 U. S. 921 (1969).

I hold that Respondents have failed to produce enough evidence of sufficient weight to overcome the presumption of compensability provided by Section 20(a) of the Act. Dr. Stallard, Employer's medical director had to concede that Claimant's lungs were permanently damaged (Tr. 156), but could only say that, in his opinion, such damage was "not precisely related to his welding exposure" (Tr. 157). Dr. Stallard stated further (Tr. 157) that welding fumes may have caused a temporary aggravation of an underlying problem, but that the duration and intensity of the exposure was not sufficient to have produced a permanent effect. In view of the uncontested facts regarding the course of Claimant's disease from 1971 to the time of the trial, I find this testimony to be incredible and it is therefore rejected.

Dr. Stallard was of the opinion (Tr. 178) that Claimant's emphysema was not *caused* by his "short" exposure to welding smoke, but could not state the length of exposure that could cause emphysema. As noted above, Dr. Stallard first stated that Claimant's exposure to welding fumes may have caused a *temporary* aggravation to an underlying problem (Tr. 157). Later on in his testimony, however, he stated that he was positive that Claimant had a pre-existing condition (Tr. 181), and that such condition could and perhaps did, lead to the disease, emphysema, which Claimant now suffers from.

In order to find a causal relationship between Claimant's disease and his employment, it is not necessary to find that the

disease was actually caused by the employment. It is well settled that an aggravation of a pre-existing condition may constitute a compensable injury under the Act. *Wheatly v. Adler*, 407 F. 2d 307 (D. C. Cir. 1968); *J. V. Vozzolo, Inc. v. Britton*, 377 F. 2d 144 (D. C. Cir. 1967); *Howell v. Einbinder*, 350 F. 2d 442 (D. C. Cir. 1965); *Independent Stevedore Company v. O'Leary*, 357 F. 2d 812 (9th Cir. 1966). This principle has been followed by the Benefits Review Board in a number of cases. *Virginia Hotel Company v. Mills*, BRB No. 73-133 (April 2, 1974); *Holmes & Narver, Inc. v. Kane*, BRB No. 73-139 (May 6, 1974); *Ingalls Shipbuilding Corp. v. Spicer*, BRB No. 74-116 (August 1, 1974); *Nolan v. Ingalls Shipbuilding Corp.*, BRB No. 74-127 (October 11, 1974); *Jesse Lee III v. National Realty & Construction Company*, BRB No. 74-183 (January 13, 1975).

Benefits under the Act are not limited to employees who happen to enjoy good health. On the contrary, employers accept those frailties of employees that predispose them to bodily hurt. *J. V. Vozzolo, Inc. v. Britton*, *supra*. It is sufficient if a work related accident aggravated, accelerated, or combined with a disease or infirmity to produce the death or disability for which compensation is sought, and the relative contribution of the accident and the prior disease is not weighed. Legally, the injury is the proximate cause of the disability in such cases. *Independent Stevedore Company v. O'Leary*, *supra*.

The evidence adduced by Employer on the issue of causation is insufficient to rebut the presumption of compensability. Accordingly, it is found that Claimant's disease was either caused or aggravated by his employment with Employer. Even if it court, for the sake of argument, be conceded that Employer's evidence on causation was sufficient to rebut the presumption of Section 20(a) of the Act, it is clear that the evidence adduced by Claimant in support of his position, is much weightier than that adduced by Respondents.

5. At the close of the trial the parties agreed (Tr. 244) that Employer would obtain and submit information pertaining

to the determination of Claimant's average weekly wage at the time of the injury. Employer's Exhibit 7, p. 2, submitted in accord with said agreement, is a chart showing actual weekly and cumulative pay of Claimant for the 22-week period starting August 10, 1973, when Claimant was re-employed by Employer, and ending with the week of January 4, 1974, which was about the time that Claimant's respiratory troubles became serious. Since this is the only wage information available for a period prior to the time of the injury, and since Claimant has raised no objection to Employer Exhibit 7, I will use the 22-week period set forth on said Exhibit to calculate average weekly wage under the authority of Section 10(c) of the Act. By dividing total wages of \$3853.28 by the 22-week period I arrive at the figure of \$175.15 which I hold to be Claimant's average weekly wage at the time of the injury.²

6. A more difficult problem, especially in the absence of medical testimony on the point, is the determination of the nature and extent of Claimant's disability. When Claimant quit working for Employer, he had already been moved to a job which paid less than he had earned as a welder. Subsequently, according to Claimant's Exhibit 10, he held 4 different jobs over a period of about 14 months and has been unemployed from January 15, 1976 to the time the brief was filed, which was January 30, 1976. There was also a 3-month period of unemployment between two of the various jobs held by Claimant since he quit work for employer. There is no information as to whether or not Claimant has worked since January 30, 1976.

Disability is incapacity, because of injury to earn the wages that Claimant was receiving at the time of the injury. *Owens v. Traynor*, 274 F. Supp. 770, aff'd 396 F. 2d 785 (1968).

Disability is an economic concept rather than a medical concept. Even a relatively minor injury must lead to a finding of

2. All computations provided for in this Decision and Order will be made by the Deputy Commissioner in accord with its terms. All computations set forth herein are subject to verification by the Deputy Commissioner.

total disability if it prevents the employee from engaging in the only type of employment for which he is qualified, *American Mutual Insurance Co., of Boston v. Jones*, 426 F. 2d 1263 (1970).

Therefore, the evaluation of the disability must include consideration of age, experience, education, mentality, industrial history, and the availability of work which the employee can do, *Watson v. Gulf Stevedoring Company*, 400 F. 2d 649; 404 F. 2d 1059, cert. denied 394 U. S. 976; *J. W. McGrath Corp. v. Hughes*, 289 F. 2d 403 (1961).

The decision as to whether disability exists must be based on substantial evidence, that is to say upon evidence which a reasonable mind would accept to support a conclusion, *J. W. McGrath Corp. v. Hughes*, 289 F. 2d 403; *J. W. McGrath v. Hughes*, 264 F. 2d 314; *Universal Camera Corp. v. NLRB*, 340 U. S. 474, 71 S. Ct. 456 (1951).

The burden is upon the employer to establish that an employee who is injured in the course of his employment and is disabled from pursuing his employment has actual opportunities to obtain other work. To carry this burden the employer must adduce evidence that there exists some type of available employment which is within the reach of the employee, *Perini Corporation v. Heyde*, 306 F. Supp. 1321 (1969) and cases cited therein.

Claimant is claiming permanent partial disability compensation (Tr. 35) for an unscheduled injury under Section 8(c) (21) of the Act. It is well established that the test of entitlement to compensation under the Act, in the case of an unscheduled disability, is economic disability, defined as a loss of wage-earning capacity resulting from an anatomical impairment, *Owens v. Traynor*, 274 F. Supp. 770 (D. Md. 1966), aff'd. 396 F. 2d 783 (4th Cir. 1968), cert. denied, 393 U. S. 962 (1966); *Army and Air Force Exchange Service v. Neuman*, 278 F. Supp. 865 (W. D. La. 1967).

A claimant's wage-earning capacity is to be determined under the terms of Section 8(h) of the Act. Section 8(h) provides that

in cases of claims for partial disability under Section 8(c)(21), the wage-earning capacity of an injured employee shall be determined by his actual earnings, if such earnings fairly and reasonably represent his wage-earning capacity. A proviso to Section 8(h) provides:

That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner [Administrative Law Judge] may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other facts or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

In applying the test for entitlement under Section 8(h), it has consistently been held that wages received on returning to work after an injury, are indicative, but not alone determinative, of wage-earning capacity, *United Engineering Co. v. Pillsbury*, 92 F. Supp. 898 (N. D. Cal. 1950), aff'd 187 F. 2d 987 (9th Cir. 1951), aff'd 342 U. S. 197 (1952), *Twin Harbor Stevedoring and Tug Co. v. Marshall*, 103 F. 2d 513 (9th Cir. 1939).

Since post-injury actual earnings must be considered as being indicative only of earnings capacity, it is obvious to me that it would be improper to simply hold that actual earnings fairly and reasonably represent wage-earning capacity, without, in every case where the issue arises, applying and considering all of the criteria set forth in the proviso to Section 8(h). I so hold and shall proceed to consider such criteria as well as Claimant's wages subsequent to the injury.

The most complete record of Claimant's employment since leaving Employer's shipyard, is Claimant's Exhibit 10, which was attached as page 15 of Claimant's brief and has been received into evidence. From October 24, 1974, when Claimant quit working for Employer, to the date of the trial was approximately 58 weeks. During this period Claimant earned approxi-

mately \$4,449.34. \$4,449.34 divided by 58 weeks equals \$76.71 per week, which I hold to be Claimant's average weekly wage from the time he left the shipyard to the date of the trial. This is a reduction of \$98.44 per week from his \$175.15 weekly wage at the time of the injury.

In addition to impairment of actual earnings, Section 8(h) sets forth the following criteria for consideration:

(a) *Nature of injury.* Emphysema is obviously a serious and limiting disease. Claimant testified that he lost 4 jobs because of his disease (Tr. 68).

(b) *Degree of physical impairment.* We have no medical evidence on this point, but Claimant's work record at the shipyard and subsequent thereto shows that the impairment is substantial physically as well as economically.

(c) *Claimant's usual employment.* It appears certain that Claimant will not be able to resume his trade as a welder without further endangering his health.

(d) *Effect of Claimant's disability as it naturally extends into the future.* Claimant's employment record since working for Employer makes his future work capabilities questionable. As his disease progresses his chances for work will probably diminish.

Considering the foregoing, I find Claimant's wage-earning capacity to be his average weekly wage at the time of the injury less 60%, and find further that he has a 60% temporary partial disability. I have classified Claimant's disability as temporary for several reasons: (1) Claimant is young and physically able and there was no expert evaluation as to medical limitations current or future; (2) Claimant had some contact with vocational rehabilitation, but there is no evidence as to what his potential in this area might be; and (3) Claimant has been able to work almost continually since leaving the shipyard and, even though he has changed jobs often, it is possible that suitable work which he could handle, might become available on a long-term basis. When some of these current uncertainties are re-

solved, a permanent rating may be more appropriate, and application therefor may be made by either party.

Section 8(e) of the Act provides that in cases of temporary partial disability, the compensation shall be $\frac{2}{3}$ of the difference between the injured employee's average weekly wages before the injury and his wage-earning capacity thereafter. Claimant's average weekly wage at the time of the injury was \$175.15. This results in a reduction in wage-earning capacity to \$70.06 and a compensation rate of \$70.06 per week.

7. In view of my conclusion that Claimant is entitled to compensation, it follows that Claimant is also entitled to interest at the rate of 6 per cent per annum computed from the date each payment of compensation was originally due (*Ryan v. McKie Company and Liberty Mutual Insurance Company*, 1 BRBS 221, BRB No. 74-160, (12-10-74)).

8. Claimant is also entitled to reimbursement and/or payment by Employer of the reasonable cost of such necessary medical care and treatment as the nature of Claimant's injury has required or may require.

9. Section 14(e) of the Act provides that when any installment of compensation payable without an award is not paid within 14 days after it is due, there shall be added a 10 percent penalty unless the Employer filed a Notice of Controversy pursuant to Section 14(d), with the Deputy Commissioner, or the payment is excused by a showing that the payment could not be made as a result of conditions beyond the Employer's control. Employer filed a Notice of Controversy dated June 25, 1975, long after the time provided by Section 14(d), and there is no evidence that the failure to make full payments on time was beyond the Employer's control, as required by Section 14(d). In view of Employer's failure to comply with Section 14(d), an assessment of a 10 percent penalty against Employer pursuant to Section 14(e) of the Act is mandatory. *Ryan v. McKie Company and Liberty Mutual Insurance Company*, 1 BRBS 221, BRB No. 74-160 (12-10-74).

10. Pursuant to 20 C. F. R. 702, Counsel for Claimant has filed an application for an attorney's fee in the total amount of \$5,494.30, including \$34.30 in costs. Employer's attorney considers the request to be "excessive and unreasonable" (Empl. Ex. 7, p. 1). Although Claimant's attorney did a conscientious job and prepared a substantial brief, I am of the view that the time spent on the different aspects of the case was greater than is normal or necessary in a case of this length and degree of complexity. For example, there are charges for 63 hours of research, 22.5 hours for interviews, 9.5 hours of travel, and 125 "calls and letter".

Section 702.132 of the Regulations provides that "Any fee approved shall be reasonably commensurate with the actual necessary work performed and shall take into account the capacity in which the representative has appeared, the amount of benefits involved and the financial circumstances of the Claimant." Taking the foregoing into consideration together with pertinent provisions of Section 28 of the Act (33 U. S. C. 928), I hereby approve an attorney's fee of \$2,500 plus \$34.30 in reasonable and necessary costs.

ORDER

1. Employer shall pay Claimant compensation for 60 percent temporary partial disability at the rate of \$70.06 per week, in biweekly payments, beginning the day after Claimant finally ceased working for Employer, which date is to be definitely established by the Deputy Commissioner after consulting with the parties and examining Employer's records showing Claimant's dates of employment. Said payments are to continue until further order or until the expiration of five years.
2. All compensation installments due and unpaid to the date of this Order shall be paid forthwith in a lump sum, including interest at the rate of six percent per annum from the date each installment was due until finally paid.

3. Employer shall pay Claimant as additional compensation pursuant to Section 14(e) of the Act, an amount equal to 10 percent of each unpaid compensation installment that is due and payable.

4. Employer shall pay for or reimburse Claimant for such reasonable medical services and supplies as the nature of his injury has required or may require.

5. Employer shall pay directly to Robert Arthur Blount, Esquire, the sum of \$2,500 for legal services rendered on behalf of Claimant, plus \$34.30 in reasonable and necessary costs.

/s/ Charles F. Simon

Charles F. Simon

Administrative Law Judge

Dated: July 19, 1976 Washington, D. C.

Supreme Court, U.S.
FILED
JAN 10 1979
MICHAEL RODAK, JR., CLERK

No. 78-1012

In the Supreme Court of the United States
OCTOBER TERM, 1978

NEWPORT NEWS SHIPBUILDING AND
DRY DOCK COMPANY, PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION
PROGRAMS, U.S. DEPARTMENT OF LABOR,
and SAMMY J. JENKINS

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT
IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT*

**MEMORANDUM FOR THE FEDERAL RESPONDENT
IN OPPOSITION**

The judgment of the court of appeals in this case was entered on September 21, 1978 (Pet. App. A). Petitioner did not seek rehearing in the court of appeals and did not obtain an extension of time within which to file a petition for certiorari. The time provided by 28 U.S.C. 2101(c) within which to file a petition for certiorari therefore expired on December 20, 1978. The petition was not filed until December 21, 1978. The time limit provided by Section 2101(c) is jurisdictional.¹ *Department of Banking*

¹On December 23, 1978, after the time for filing the petition had expired, petitioner filed an "Application for Leave to File Petition for Writ of Certiorari Out of Time," alleging that weather conditions had prevented the timely delivery of the petition to the Court for filing. Neither weather conditions nor other mishaps provide any basis for this Court to waive the statutory limitation on the period for filing a petition. See *Teague v. Regional Commissioner of Customs*, 394 U.S. 977 (1969).

v. *Pink*, 317 U.S. 264 (1942). It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

JANUARY 1979